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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CARLOS LUNA and RAMIRO ALEX HUERTA, Defendants and Appellants.	G041053 (Super. Ct. No. 07CF1459) O P I N I O N

Appeal from judgments of the Superior Court of Orange County, W. Marc Kelly, Judge. Affirmed with directions.

Richard Jay Moller, under appointment by the Court of Appeal, for Defendant and Appellant, Carlos Luna.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant, Ramiro Alex Huerta.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr., and Angela M. Borzachillo, Deputy Attorneys General, for Plaintiff and Respondent.

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Following an attack on victim Jose Garcia at the Theo Lacy Jail Facility, a jury convicted defendants Carlos Luna and Ramiro Alex Huerta of one count of attempted murder (Pen. Code, §§ 187, 664);[1] one count of assault with a deadly weapon (§ 245, subd. (a)(1)); and one count of street terrorism (§ 186.22, subd. (a)). The jury found Huerta committed the attempted murder with deliberation and premeditation, but that Luna did not premeditate or deliberate. The jury also found true various gang purpose enhancement allegations against defendants. (§ 186.22, subd. (b)(1).) The trial court sentenced Luna (who had previously been convicted of multiple strikes) to 40 years to life in state prison and Huerta to 17 years to life in state prison.

Defendants argue: (1) Luna's right to a fair trial was prejudicially violated by the court's instruction of the jury with CALCRIM No. 403, the natural and probable consequences doctrine, in connection with Luna's role in the attack; (2) the prosecutor's closing argument violated Luna's right to a fair trial by presenting a legally incorrect theory of the case; (3) defense trial counsel provided ineffective assistance of counsel by failing to compel the victim, Garcia, to testify at trial; (4) the evidence was insufficient to sustain street terrorism convictions and/or true findings on street gang enhancements; (5) the court abused its discretion by opting not to strike two of Luna's prior strikes at sentencing; and (6) Luna's abstract of judgment should be corrected to accurately reflect

[1] All statutory references are to the Penal Code.

his sentence. Other than correcting Luna's abstract of judgment, we affirm both judgments.

FACTS

On the morning of April 11, 2007, the doors to several cells at the county jail opened for the inmates to go to breakfast. Huerta and his cellmate Gonzalez[2] were in cell number 8; Luna was in cell number 4; and Garcia (the victim) was in cell number 6.

Deputy James Van Patten (serving as a prison guard) saw Huerta moving rapidly toward Garcia. Huerta began punching Garcia with a closed fist on the head, neck, and torso. Next, Van Patten observed Luna join the fight as Garcia was moving backward attempting to defend himself. Garcia was backed against a wall and took a defensive posture by covering up his head with his arms. At this point, Van Patten observed Huerta slashing across Garcia's head and upper body at least four times with an object in his right hand. Van Patten could not see the object, but it looked as if Huerta was grasping something and his hand movements indicated he was slashing Garcia. Luna punched Garcia as Huerta was slashing. Deputy Dale Clifton confirmed much of Van Patten's testimony based on his observations of the events.

The combatants did not comply with a loud speaker announcement to stop fighting and fall to the ground. Before order had been restored, Huerta tossed something into the prisoner dayroom area on the lower tier of the jail. Gonzalez ran down the stairs into the dayroom, picked up the object, ran to his cell, and flushed the object down the toilet. Despite efforts to recover the object, nothing was retrieved from the toilet. Eventually, when enough deputies had arrived to restore order, everyone fell to the ground. Van Patten testified prisoners often fashion implements called "shanks" to use as

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[2] The record did not provide a first name for Gonzalez.

weapons; a shank is a piece of metal attached to another object used as a handle. Van Patten noted Gonzalez told him after the incident that he had flushed a "kite" (a written note) down the toilet. But Van Patten testified he did not think it possible the object was a kite because it appeared to be a heavy object by the manner in which it fell to the ground. Garcia suffered injuries to his face, neck, and the back of his head; his wounds required stitches or staples.

Deputy James Karr was qualified as an expert on criminal street gangs. Karr testified he was familiar with a Stanton, California based gang called "Crow Village" and a Santa Ana, California based gang called "F-Troop," a gang unaffiliated with Crow Village. Karr detailed facts suggesting Luna was a member of the Crow Village gang.[3] Karr opined Luna was "an active participant of Crow Village at the time of [the attack on Garcia]." Responding to a hypothetical question reflective of the facts pertaining to this incident as described above, which assumed all three participants were gang members, Karr opined that the particular offense committed by the Crow Village gang member was done for the benefit of and to promote, further, or assist the Crow Village street gang.

Daniel Barnes, a police officer, also testified as a gang expert on the "Monos" street gang based in La Habra, California. Barnes cited facts suggesting Huerta was a member of the Monos street gang. Barnes opined Huerta was an active participant in the Monos street gang on the date of the attack on Garcia. Barnes also opined, in answer to a hypothetical question reflective of the facts of the Garcia attack, that Huerta committed the attack to further his status as a Monos criminal street gang member.

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[3] The People state in their brief that Karr testified Garcia was an F-Troop gang member, but their citation to the record does not disclose such testimony. Several photographs were entered into evidence, however, that depicted both the extent of Garcia's injuries and tattoos linking him to F-Troop. Photographs of the defendants' gang tattoos were also entered into evidence.

Both expert witnesses, Karr and Barnes, testified to the importance of violence and "respect" in gang culture. Barnes testified that gang members attempt to inflict as much injury as possible when they attack and learn to attack the neck and head to accomplish this goal.

Only the aforementioned witnesses testified. Neither the victim, Garcia, nor the defendants testified. The jury convicted and the court sentenced defendants as detailed above. We shall set forth additional facts as necessary to discuss each of the six discrete issues below.

DISCUSSION

Instruction of Jury With CALCRIM No. 403

Despite not objecting to such instruction at trial, Luna contends the court violated his due process rights by instructing the jury with CALCRIM No. 403, which pertains to the natural and probable consequences doctrine.[4] Luna claims it was improper

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[4] As provided to the jury in this case, the instruction states: "Before you may decide whether . . . Luna is guilty of [sections] 664/187, attempt murder, or [section] 245[,subdivision] (a)(1), assault with a deadly weapon, you must decide whether he is guilty of . . . section 240, assault, or . . . section 245, battery. To prove that . . . Luna is guilty of attempt murder, and/or assault with a deadly weapon, the people must prove that; one, . . . Luna is guilty of [section] 240, assault, and/or [section] 242, battery. Two, during the commission of the assault or battery a co-participant in the assault or battery committed the crime of attempt murder or assault with a deadly weapon. [¶] And, under all of the circumstances, a reasonable person in . . . Luna's position would have known that the commission of the attempt murder or assault with a deadly weapon was a natural and probable consequence of the commission of a [section] 240, assault, or [section] 242, battery. [¶] A co-participant in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander. [¶] A natural and probable consequence is one that a reasonable person knows is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence. If the attempt murder or the assault with a deadly weapon was committed for a reason independent of the common plan to commit the assault or battery, then the commission of the attempt murder or

to authorize the jury to find Luna guilty of attempted murder as a natural and probable consequence of his aiding and abetting an assault or battery of Garcia. Even assuming this issue has not been forfeited, we find no instructional error.

"[A] defendant may be held criminally responsible as an accomplice not only for the crime he or she intended to aid and abet (the target crime), but also for any other crime that is the 'natural and probable consequence' of the target crime." (*People v. Prettyman* (1996) 14 Cal.4th 248, 261 (*Prettyman*).) A jury "must find that the defendant, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of a predicate or target offense; (3) by act or advice aided, promoted, encouraged or instigated the commission of the target crime[;] . . . (4) the defendant's confederate committed an offense *other than* the target crime; and (5) the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted." (*Id*. at p. 262, fn. omitted.)

A charged crime is a natural and probable consequence of a target crime if it was reasonably foreseeable that the charged crime would be committed. "The . . . question is not whether the aider and abettor *actually* foresaw the additional crime, but whether, judged objectively, it was *reasonably* foreseeable." (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1133.)

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assault with a deadly weapon was not a natural and probable consequence of the assault or battery. [¶] To decide whether attempt murder or assault with a deadly weapon was committed, please refer to the separate instructions that I will give you on those crimes. The People are alleging that . . . Luna originally intended to aid and abet either [section] 240, assault, or [section] 242, battery. Luna is guilty of attempted murder or assault with a deadly weapon if you decide that . . . Luna aided and abetted one of these crimes, and that attempt murder or assault with a deadly weapon was the natural and probable result of one of these crimes. However, you do not need to agree about which of these two crimes the defendant aided and abetted."

Several cases, including recent Supreme Court authority, have held that, subject to the deferential substantial evidence standard, it is for the jury to determine whether murder is a reasonably foreseeable consequence of a fight involving gang members. (See *People v. Medina* (2009) 46 Cal.4th 913, 922-923 [killing of fleeing victim by one gang member's gunshot was reasonably foreseeable consequence of all three gang members repeatedly challenging victim with gang inquiries and engaging in a fistfight]; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 10-11 [fatal shooting during gang-related fistfight was natural and probable consequence of fistfight]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1375-1376 [defendant's punching of victim during gang confrontation foreseeably led to fatal shooting of victim by fellow gang member]; *People v. Godinez* (1992) 2 Cal.App.4th 492, 499–500 [fatal stabbing of rival gang member either during or after fistfight was natural and probable consequence of fistfight].)

Several appellate cases have held that it is for the jury to determine whether *attempted* murder is a reasonably foreseeable consequence of a fight involving gang members. (*People v. Caesar* (2008) 167 Cal.App.4th 1050, 1056-1058 [attempted murder conviction based on assault and battery as target offenses], disapproved on other grounds in *People v. Superior Court (Sparks)* (2010) 48 Cal.4th 1, 18; *People v. Hoang* (2006) 145 Cal.App.4th 264, 275-276 [attempted murder was natural and probable consequence of assault with a deadly weapon aided and abetted by gang member defendant]; *People v. Montes* (1999) 74 Cal.App.4th 1050, 1054-1056 [attempted murder by shooting of rival gang member during retreat from fight was natural and probable consequence of gang fight in which defendant wielded a chain]; *People v. Montano* (1979) 96 Cal.App.3d 221, 225-227 [defendant's aiding and encouragement of battery on rival gang victim foreseeably led to attempted murder of victim by fellow gang members], superseded by statute on other grounds as explained in *People v. Singleton* (1980) 112 Cal.App.3d 418, 424.)

Moreover, analyzing murder cases, our Supreme Court has rejected Luna's argument that the natural and probable consequences doctrine creates an unconstitutional presumption by permitting a conviction based on mere negligence. (*People v. Richardson* (2008) 43 Cal.4th 959, 1021-1022; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 106-108.)

In *People v. Lee* (2003) 31 Cal.4th 613 (*Lee*), our Supreme Court addressed whether an aider and abettor must personally possess willfulness, premeditation, and deliberation to be found guilty of attempted murder with willfulness, premeditation, and deliberation. (*Id*. at p. 616.) In doing so, the *Lee* court suggested the natural and probable consequences doctrine is applicable to attempted murder. The *Lee* court first explained that section 664, subdivision (a), "states *only* that the murder attempted must have been willful, deliberate, and premeditated, *not* that the attempted murderer *personally* must have acted willfully and with deliberation and premeditation." (*Id*. at p. 622.) The court concluded "that an attempted murderer who is guilty as an aider and abettor, but who did not personally act with willfulness, deliberation, and premeditation, is sufficiently blameworthy to be punished with life imprisonment" because such aider and abettor necessarily has the mental state of intent to kill and a mental state "approaching" deliberation and premeditation. (*Id*. at p. 624.) "Of course, where the natural-and-probable consequences doctrine does apply, an attempted murderer who is guilty as an aider and abettor may be less blameworthy. In light of such a possibility, it would not have been irrational for the Legislature to limit section 664[,subdivision] (a)[,] only to those attempted murderers who personally acted willfully and with deliberation and premeditation. But the Legislature has declined to do so." (*Id*. at pp. 624-625; see also *People v. Curry* (2007) 158 Cal.App.4th 766, 791-792 [applying *Lee* to natural and probable consequences fact pattern]; *People v. Cummins* (2005) 127 Cal.App.4th 667, 680 [same].)

In light of the foregoing authorities, we reject Luna's contention. Case law indicates an aider and abettor may be held responsible for an attempted murder through the natural and probable consequences doctrine. It was for the jury to decide whether the attempted murder of Garcia was a natural and probable consequence of the attack joined in by Luna.

Doctrinally, this result is troubling. First, it is inconsistent with other well-established principles of California law. "California courts have consistently held that there are no crimes of attempted felony-murder, attempted murder based on implied malice, and attempted involuntary manslaughter, since all of these crimes by definition do not require the defendant have the specific intent to kill." (*People v. Brito* (1991) 232 Cal.App.3d 316, 321, fn. omitted; *People v. Carpenter* (1997) 15 Cal.4th 312, 391 ["We agree that attempted murder requires express malice, i.e., an intent to kill"], superseded by statute on other grounds as explained in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1106-1108.] Thus, several concepts that eliminate the burden of proving a specific intent to kill in cases where the victim actually dies do not apply when the victim does not die.

Second, California law on this point is out of step with most American jurisdictions. (See, e.g., *Wilson-Bey v. United States* (D.C.App. Cir. 2006) 903 A.2d 818, 832-837, fn. 28 [in rejecting use of natural and probable consequences doctrine as jury instruction for aider and abettor in premeditated murder case, court characterizes California's "natural and probable consequences" doctrine as "minority" approach to problem of liability of aiders and abettors and catalogues federal and state jurisdictions requiring proof of mens rea for aiders and abettors]; *Sharma v. State* (2002) 118 Nev. 648, 654-655 [56 P.3d 868] [accomplice must have specific intent to kill to be guilty of attempted murder; court disavowed and abandoned application of "natural and probable consequences" doctrine to specific intent crimes].)

In our view, California courts, without persuasive rationale, have expanded the common law natural and probable consequences doctrine for use as a substitute for proof of aiders and abettors' mens rea in specific intent crimes. But, constrained by authority, we reject Luna's challenge.

Prosecutor's Closing Argument

Relatedly, Luna argues the prosecutor's closing argument violated his right to a fair trial by misstating the law. There was no objection to the prosecutor's closing argument at trial. Even assuming Luna has not forfeited this issue by failing to object and request an admonition at trial, we find nothing in the closing argument that would necessitate a new trial.

While discussing the natural and probable consequences doctrine, the prosecutor stated: "Does assault and battery equal attempted murder. It does. Because you are now looking at 'A' and 'C' [referring to two different attackers of a third individual, the victim 'B']. This is not boy scouts, it's a jail facility. This individual knows based upon their history, their ideology inside the jail facility, going against a gang member. Whether or not he knew that . . . Huerta had a weapon or not is irrelevant. The fact that he joined in on that fight, the assault and battery. [¶] So folks, you have to ask yourself this question, unless you can say, oh, my gosh, I can't believe that happened, unless you can say that, you have to find . . . Luna just as guilty as the individual that was doing the stabbing, unless you can say that to yourself. Unless you can say, oh, my gosh, I cannot believe that happened, based upon all of those factors. [¶] . . . [¶] At the beginning of this case I told you you might hear some law that might surprise you. All of you took an oath that you would follow the law. So the law requires that you follow this. And . . . unless you can say, oh, my gosh, I can't believe this happened, you have to find . . . Luna just as guilty as . . . Huerta as far as the attempted murder and as far as the

assault with a deadly weapon. So long as you believe he committed an assault and battery, he's guilty of the attempted murder and the assault with a deadly weapon."

As discussed in the previous section, the jury's task according to its instructions (assuming it found Luna aided and abetted the assault or battery of Garcia) was to determine whether, under all of the circumstances, attempted murder or assault with a deadly weapon was a natural and probable consequence of the commission of assault or battery. A natural and probable consequence is one that a reasonable person knows is likely to happen if nothing unusual intervenes. As with all other elements, the jury needed to make its finding beyond a reasonable doubt.

The prosecutor, obviously, did not stick to the script of CALCRIM No. 403 and other relevant instructions in describing how the jury should think about its task. Instead, the prosecutor asked the jurors to consider whether they would utter the phrase "Oh my gosh, I can't believe this happened[!]" after observing the attempted murder (which went beyond the target crime of assault or battery).

When a claim of prosecutorial misconduct focuses on comments made by the prosecutor to the jury, "'the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.'" (*People v. Ochoa* (1998) 19 Cal.4th 353, 427.) While we do not endorse the prosecutor's description of the jury's function in assessing the natural and probable consequences issue, we see no reason to question whether the jury followed the proper instructions provided to it by the court. It appears the prosecutor was simply attempting to illustrate the importance of considering the particular circumstances of the case (three incarcerated gang members fighting, rather than, for example, three boy scouts fighting) in deciding whether attempted murder was a natural and probable consequence of the fight.

Failure to Secure Testimony of Garcia

Next, Luna argues he received ineffective assistance of counsel with regard to his counsel's failure to interview and call Garcia to testify at trial. Huerta joins in this argument. The prosecutor had Garcia available to testify, but chose not to call him to the witness stand. Counsel for Huerta asked for and received permission to interview Garcia about whether "he is going to testify or not" and the court ordered a recess. After the recess, counsel for Huerta indicated he had interviewed Garcia, and decided not to call Garcia as a defense witness after evaluating his position. Counsel for Luna stated: "You know, I did not interview . . . Garcia, but based on the representations of [Huerta's counsel] we will not call him." All counsel consented to the court sending Garcia back to jail with no further removal order.

Luna claims his counsel rendered ineffective assistance by failing to subpoena, interview, and call Garcia to testify. Luna points to a letter sent by Garcia to the court and statements made by Garcia to the probation officer. However, it appears the most likely tactical reason for trial counsel to refrain from calling Garcia to testify is that he would have refused to testify or that his testimony would have been so preposterous as to harm rather than help Luna and Huerta. We will not presume deficient performance. (See *People v. Thomas* (1992) 2 Cal.4th 489, 531-532.)

Sufficiency of Evidence With Regard to Street Terrorism and Gang Enhancements

Defendants assert there is insufficient evidence in the record to sustain their street terrorism convictions (§ 186.22, subd. (a)) and street gang enhancements (§ 186.22, subd. (b)(1)). We must review the entire record in the light most favorable to the judgment in determining whether it contains substantial evidence "'"'"from which a rational trier of fact could have found defendant[s] guilty beyond a reasonable doubt.'"'"' (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 321 (*Villalobos*).)

Section 186.22 provides, in relevant part: "(a) Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years. [¶] (b)(1) Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows . . . ."

Defendants argue the record lacks any evidence that they either: (1) were active gang participants and willfully promoted, furthered, or assisted "any felonious criminal conduct by members of [their] gangs" under section 186.22, subdivision (a); or (2) committed their felonies "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members" under section 186.22, subdivision (b)(1). Defendants contend nothing in the record shows: Luna or Huerta were active participants in their gangs at the time of the offense; Luna and Huerta knew each other or their particular gang affiliation; any affiliation between their gangs; any particular antipathy toward Garcia's gang, F-Troop; any particular motive for the attack on Garcia; any gang slogans or threats communicated before, during, or after the attack; or any specific benefit arising for any particular gang or gang member as a result of this attack.

As to the street terrorism convictions, active participation in a gang is defined as "involvement with a criminal street gang that is more than nominal or passive." (*People v. Castenada* (2000) 23 Cal.4th 743, 747.) A jury may rely on

qualified expert testimony to support this element. (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1330-1331.) Barnes testified Huerta was, as of April 11, 2007, an active participant in the Monos gang based on: over 50 documents relating to Huerta's activies in La Habra, California (including field interview cards); instances as recent as 2006 in which Huerta claimed to officers questioning him to be a member of Monos with a gang moniker of "Oso"; the tattoos on Huerta's body; and an Orange County Sheriff's Department report indicating Huerta claimed gang affiliation with Monos inside the jail facility. Karr testified Luna was, as of April 11, 2007, an active participant in Crow Village based on: field interview cards from 1998 through 2006 listing Luna as a Crow Village member and indicating Luna was associating with other known Crow Village members (including one on parole); Luna provided the moniker "Loco" in connection with the form provided to him upon his March 2007 arrest; books with gang writing and symbols found in Luna's room when he was arrested; and tattoos on Luna's body. There is substantial evidence defendants were active gang participants on the date of the crimes.

Defendants also claim a lack of evidence they willfully promoted, furthered, or assisted "in any felonious criminal conduct by members of that gang" of which they were a part. But the two expert witnesses, Karr and Barnes, respectively opined as to the culture of violence endemic to gangs and the importance of developing "respect" for gangs and individual members thereof through violent acts. In response to a hypothetical question based on facts matching those of this case, both experts opined an attack like that committed in this case would be done to advance the interests of the attackers' gangs. Defendants do not assert there is a lack of evidence supporting the jury's conclusion as to defendants' participation in the felonies at issue in this case. (See *People v. Salcido* (2007) 149 Cal.App.4th 356, 367 [§ 186.22, subd. (a), "applies to a direct perpetrator's gang-related criminal conduct"].) There is substantial evidence in the record supporting the street terrorism convictions of Luna and Huerta.

Gang membership by itself is insufficient to prove a gang enhancement. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 623-624; *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1996.) But there is sufficient evidence here to support the enhancements.

As to the first element of the enhancements, there is substantial evidence supporting the jury's finding the attack was "committed for the benefit of, at the direction of, or in association with [a] criminal street gang . . . ." (§ 186.22, subd. (b)(1).) The jury could have concluded Luna and Huerta were gang members. The attack was perpetrated upon another gang member. The gang experts testified as to how such violent attacks benefit gangs and how gang members are expected to commit violent acts to maintain respect for the gang and its individual members. The jury was free to consider the circumstances of this particular attack and to agree with the expert testimony suggesting the attack at issue was "committed for the benefit of, at the direction of, or in association with [the Monos and Crow Village gangs]." (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1197-1198 (*Morales*).)

We also find substantial evidence supporting the jury's finding that defendants had the "specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." (§ 186.22, subd. (b)(1).) The statute merely requires assistance to "criminal conduct by gang members . . . ." (§ 186.22, subd. (b)(1).) "Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime." (*Villalobos, supra,* 145 Cal.App.4th at p. 322 [affirming conviction of girlfriend of gang member under § 186.22, subd. (b)(1)]; see also *Morales, supra,* 112 Cal.App.4th at p. 1198 ["specific intent to *benefit* the gang is not required"].)

Court's Refusal to Strike Luna's Prior Strikes at Sentencing

Luna also challenges the court's refusal to dismiss his prior "Three Strikes" law strikes pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. The court offered the following explanation for its decision: "in looking at . . . all the *Romero* factors, and determining whether your client is somebody that falls within the spirit of the Three-Strikes law, . . . the only thing that I can see that you argued to me . . . is the fact that the prior convictions were incurred in a single course of conduct. True, the prior convictions were approximately 15 years or so before this crime, . . . he was relatively young at the time, I believe he was 18, which can be considered. But does the prior crime involve acts of violence? It certainly does. Just like this crime. [¶] In this crime here defendant is convicted of aiding and abetting an attempt murder with a slashing sharp instrument that almost killed the victim. And in the prior case . . . that also involved an attempt murder that he was convicted of. . . . [¶] Not only did your client try to rob the victim in that case by demanding his money with a knife, but when the victim then refused to give the money, the crime escalated much further, and he took a steak knife and stabbed the victim in the chest. . . . [¶] And to me when I am looking at everything, 15, 16, years later, I have a defendant incarcerated in jail in the gang culture with this, committing this crime, . . . the same type of violence, even more pronounced, in the court's eyes, because it occurred in a custodial setting, is scary, to say the least. And I just don't think it warrants me striking the strikes." The court also cited a string of misdemeanor convictions between his first strikes and this crime, and the reason for Luna's incarceration when he committed the instant offense — alleged felony witness intimidation for the benefit of a gang in a murder case. The court concluded Luna was "the exact type of defendant" for which the Three Strikes law was intended.

The California Supreme Court has determined that, "pursuant to . . . section 1385[,subdivision] (a), a trial court may strike an allegation or vacate a finding under the so-called 'Three Strikes' law [citation] that a defendant has previously been convicted of

a 'serious' and/or 'violent' felony as defined therein." (*People v. Williams* (1998) 17 Cal.4th 148, 151-152, fn. omitted.) In determining whether to exercise its discretion to do so, a court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes law] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Id*. at p. 161.)

We review the trial court's determination not to strike or vacate a prior serious and/or violent felony conviction allegation or finding "under the deferential abuse of discretion standard . . . ." (*People v. Carmony* (2004) 33 Cal.4th 367, 371.) The trial court did not abuse its discretion. The court reviewed all of the evidence submitted by the parties in considering its ruling. The court emphasized defendant's persistent recidivism and the fact defendant was incarcerated at the time of the offense committed in this case. The court was aware of its discretion to dismiss the previous strike, the court did not consider any impermissible factors in denying dismissal, and the ultimate result of the sentencing process is not "'"an arbitrary, capricious, or patently absurd" result' under the specific facts" of this case. (*Id*. at p. 378.) Thus, the trial court was well within its discretion.

Luna's Abstract of Judgment

Finally, Luna asserts the court committed clerical error in preparing the abstract of judgment. Luna states in his brief: "The abstract of judgment . . . does not indicate that the serious felony prior under . . . section 667 [,subdivision] (a)(1)[,] was stayed for assault with a deadly weapon, and was imposed only in conjunction with the life sentences. . . . Because the court did not impose any time on the determinate count, it appears that appellant's credits of 484 actual days and 72 days of conduct credit for a

total of 556 days, should be listed on the indeterminate abstract of judgment, rather than the determinate abstract of judgment." The People concede that the abstract of judgment "should be corrected to reflect that the . . . section 667, subdivision (a)(1)[,] enhancement was stayed, as was the sentence for the assault with a deadly weapon conviction, pursuant to . . . section 654 . . . . Respondent does not object to his credits [being] reflected on the abstract of judgment involving his indetermina[te] sentence as Luna's sentence for his determinant term was stayed." We agree with the parties.

DISPOSITION

The judgments are affirmed. The trial court is directed to prepare an amended abstract of judgment for Luna indicating that the section 667, subdivision (a)(1), enhancement was stayed, as was the sentence for the assault with a deadly weapon conviction, pursuant to section 654, and showing the award of 556 days of credit on the indeterminate sentence abstract of judgment rather than the determinate sentence abstract of judgment; the trial court shall then forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation, Division of Adult Operations.

IKOLA, J.

WE CONCUR:

O'LEARY, ACTING P. J.

MOORE, J.